CA No. 18-10287

D. Ct. No. 2:16-CR-46-GMN

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CLIVEN D. BUNDY, RYAN C. BUNDY,
AMMON E. BUNDY, and RYAN W. PAYNE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

GOVERNMENT'S OPENING BRIEF

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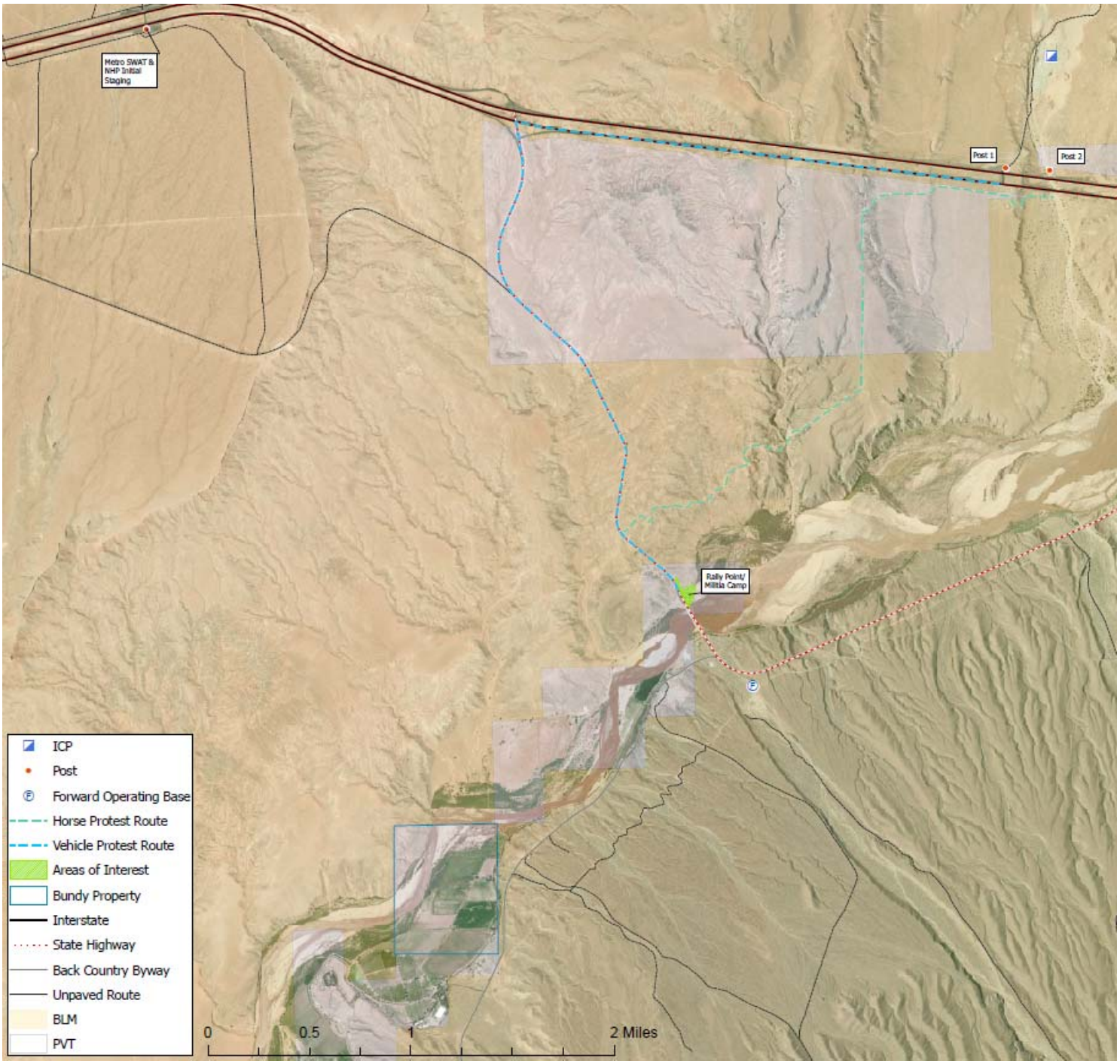

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

After grazing his cattle illegally on public land for more than 20 years and in flagrant violation of multiple federal court orders, Cliven Bundy and his codefendants orchestrated a massive armed assault on law enforcement officers working to enforce those orders. On the day of the assault, at Bundy's direction, his followers travelled *en masse* five miles from their rally site to the Toquop Wash where officers were working. Brandishing firearms from superior tactical positions, they demanded officers abandon their post and the lawfully corralled cattle. To prevent the bloodshed that was certain to follow if they remained, the officers acceded to the armed militia's extortionate demands. The sound judgment of law enforcement kept the peace that day, but the federal court's orders remain unenforced, and Bundy continues to unlawfully graze his cattle on federal land in violation of those orders.

In nearly two years of pre-trial litigation, the prosecution team disclosed more than 1.4 terabytes of discovery, after painstakingly reviewing hundreds of thousands of pages of documents. Its goal was to produce all relevant information while protecting victims, witnesses, and law enforcement officers from harassment and threats, and from the violence that had already taken the lives of two police officers and a civilian at the hands of two of Bundy's extremist followers.

On December 20, 2017, after weeks of being inundated with motions to dismiss filed faster than it could consider them, the district court declared a mistrial, accepting defense assertions that a handful of documents, if produced earlier, might have helped the defendants develop "provocation," "intimidation," or self-defense theories—theories the court had previously, repeatedly found unavailable—or rebut three allegations in the indictment. The court found the government's failure to produce these documents earlier was "willful," in several instances based solely on the fact that the FBI created or possessed the documents. And it found the defendants had suffered prejudice, even though the information was disclosed in time for them to use it at trial.

On January 8, 2018, the court dismissed the indictment against these four defendants with prejudice. Although the court had previously found nondisclosure of certain documents reasonable explicitly *because* any possible materiality was not apparent, it now found "grossly shocking" the government's "representations that it was unaware of the materiality" of those documents; and the court found "willful" and "flagrant" nondisclosures it had previously found reasonable and understandable. Moreover, based on a single document prosecutors had no reason to believe existed, the court concluded that the prosecution team's conduct amounted to an "intentional abdication of its responsibility."

Assuming *arguendo* that the government's missteps with respect to one or more of the documents constituted a *Brady* violation, the district court's factual findings—even if accurate—would not justify dismissal of the indictment with prejudice. And here, the court's findings were erroneous in several respects.

First, its findings of "flagrant" misconduct rested on an assumption that the government had been hiding certain *information*—such as the existence of a surveillance camera, the FBI's presence at a forward operating base, officers in "sniper" roles, and assessments of the threat posed by the Bundys. But the government timely disclosed significant discovery about all of those matters, and repeatedly demonstrated that the defendants' claims to the contrary were untrue. No case law supports the district court's conclusion that FBI authorship or possession of documents alone proves "willful" suppression, and the government's prior disclosures belie any suggestion of intentional or flagrant misconduct.

Second, the government disclosed the information in time for the defendants to use it at trial—and they did, as early as their opening statements. Neither the record nor the law supports the court's findings of substantial prejudice.

The court's alternative basis for finding flagrant misconduct similarly lacks merit. It found the materials relevant to "provocation" and "intimidation" defenses, but as it had explained months earlier, those are not cognizable defenses to the charged offenses. And as the court repeatedly explained, self-defense is

available only in immediate response to the actual application of excessive force by a law enforcement officer, which did not occur. To the extent the court found outrageous government misconduct on the ground that the documents were potentially helpful to developing these non-cognizable defenses, it erred.

Finally, even assuming the court correctly found a *Brady* violation with respect to one or more of the documents, the extraordinary remedy of dismissal with prejudice was far out of proportion to such violations. Any missteps were inadvertent (or at worst negligent), and those errors did not merit the court's strong condemnation of the prosecution team. Defendants suffered no substantial prejudice from the timing of the disclosures, and the record does not support the court's contrary findings. And critically, after finding a handful of documents might have been useful to rebut three overt acts alleged in the indictment, the court was required to tailor the remedy to the violation and consider options less drastic than dismissal with prejudice. This Court should reverse.

II.

STATEMENT OF JURISDICTION AND BAIL STATUS

The government appeals from the district court's orders dismissing with prejudice an indictment as to four defendants in a criminal case and denying the government's motion for reconsideration. The district court's jurisdiction rested on 18 U.S.C. § 3231. It dismissed the indictment on January 8, 2018.

Clerk's Record ("CR"):3116; *see* 1ER:16–38 (transcript). The government timely moved for reconsideration on February 7, 2018, CR:3175, which the court denied on July 3, 2018, CR:3273; 1ER:4–14. The government filed a timely notice of appeal on August 2, 2018. 1ER:1–3; s*ee* Fed. R. App. P. 4(b)(1). This Court's jurisdiction rests on 18 U.S.C. § 3731.

Defendants are not in custody.

III.

ISSUE PRESENTED FOR REVIEW

Whether the district court erred in dismissing the indictment with prejudice based on the timing of the government's production of certain documents, where any government missteps were inadvertent; the record does not support the court's findings of flagrant misconduct or substantial prejudice; and lesser sanctions would remedy any possible harm.

IV.

STATEMENT OF THE CASE AND THE FACTS

A. Cliven Bundy Unlawfully Grazes His Cattle on Public Land for Decades, Ignoring Multiple Federal Court Orders to Cease.

Cliven Bundy lives on 160 acres of rural land near Bunkerville, Nevada, surrounded by hundreds of thousands of acres of federal public land. *See* 6ER:1072. Since 1993, Bundy has grazed his cattle unlawfully on that federal public land. 6ER:1016–23, 1047–48.

In 1998, BLM sued Bundy for trespass, and the district court ordered him to remove his cattle. *United States* v. *Bundy*, 2:98-cv-531-JBR, at CR:19, *aff'd,* 178 F.3d 1301 (9th Cir. 1999) (unpublished). Bundy ignored the order. The district court issued another order in 1999, re-affirming its prior order and fining Bundy for each day he refused to comply. *Id.* at CR:46. Bundy ignored that order as well.

BLM filed a new lawsuit after Bundy's cows began trespassing into the Lake Mead National Recreation Area. In 2013, the court again ordered Bundy to remove them. *United States* v. *Bundy*, 2:12-cv-804-LDG, 2013 WL 3463610 (D. Nev. July 9, 2013); 2:98-cv-531-LRH, at CR:56. The new orders authorized BLM to remove the cattle if Bundy refused, and ordered Bundy not to interfere. 6ER:1036–37, 1049–50. As before, Bundy ignored the federal court orders.

B. When BLM Formulates an Impoundment Plan to Enforce the Court Orders, Bundy Vows to Resist and Start a "Range War."

BLM began planning to remove Bundy's estimated 1,000 head of trespass cattle roaming more than 575,000 acres of difficult terrain. 6ER:1056–57, 1066; *see* 3ER:159 (Operations Plan). It planned to establish a base of operations ("the impoundment site") on public lands at the Toquop Wash, about seven miles from Bundy's property. 6ER:1076, 1082. BLM and National Park Service officers would provide security for impoundment operations, and FBI would

investigate critical incidents involving federal personnel. 6ER:1085; 3ER:163. BLM planned to use officer Listening Post/Observation Post ("LP/OP") positions on public lands to provide overwatch of the impoundment site, Bundy's property, and points of egress and ingress. 3ER:167–68. Finally, two FBI SWAT teams—staged at a Forward Operating Base ("FOB") on public land about 1.5 miles from Bundy's property—would back up BLM officers in the event of an assault or hostage situation. 3ER:169; *see supra*, map p. ix.

In March 2014, BLM notified Bundy that impoundment operations would begin. 3ER:311–312. Bundy announced he was "ready to do battle" and would "do whatever it takes" to protect "[his] property." 3ER:313–14. When a BLM agent told Cliven's son Ryan that he was available to answer questions about the impoundment, Ryan became angry and said they would "have several hundred" people there to prevent BLM from removing the trespass cattle. 3ER:412–13; *see* Gov't. Exh. 15-d. In late March, Cliven Bundy declared he would organize "lots of groups" to "come from hundreds of miles away" for his "range war" with BLM. 3ER:319.

As impoundment preparations began, Bundy and his sons and followers interfered. In late March, they blocked an equipment convoy, confronting and threatening civilian contractors. 3ER:321–22. On April 2, Ryan Bundy and others traveled to Utah to intimidate and threaten the auctioneer hired to sell

the cattle, disrupting his auction and forcing him to shut down temporarily. 3ER:329–31; 6ER:1147.

C. Defendants Recruit Militia and Call for Violence to Stop the Impoundment.

On April 5, 2014, as the impoundment began, Cliven Bundy publicly said, among other things: "I've done quite a bit so far to keep my cattle, but I guess it's not been enough … so I guess it is going to have to be more physical." 3ER:324. Between April 6 and 12, the Bundys initiated several confrontations with law enforcement. On April 6, Ryan and Dave Bundy positioned themselves to block a BLM convoy. When they refused to leave, officers arrested Dave Bundy. 3ER:332–333; *see* Trial 1, Def. Exh. 5008-F (dash cam video of arrest), admitted CR:1785, at 155.

Following that arrest, defendant Ryan Payne contacted Cliven Bundy and offered to use "Operation Mutual Aid," Payne's network of self-proclaimed militia groups, to assist Bundy. *See* 5ER:883–84. Bundy invited Payne to bring his militia forces to Bunkerville. 5ER:884–895.

Bundy and his militia followers established a rally point near his property, about five miles from the impoundment site. 5ER:942–43; *see supra*, map p. ix. Militia members gathered there to hear speeches from Bundy and

others. *See ibid*. Codefendant Peter Santilli broadcast a series of Internet messages calling for more armed supporters to join them. 5ER:986–88.

On April 9, Ammon Bundy led a mob in blocking a BLM convoy. *See* Trial 1, Def. Exh. 5006-E (video of incident), admitted CR:1785, at 119. In response to Bundy's attempted assault, officers tased him. Payne and others used the incident to recruit more militia to Bunkerville. *See*, *e.g.*, Trial 1, Gov't Exh. 221 (discussed at 5ER:898–900).

By April 9, Payne had established his militia headquarters on Bundy's property, using social media to call for additional support. *See*, *e.g.*, 5ER:886–95. As militia units arrived, Payne threatened violence, proclaiming in one interview that, in order for everyone to leave safely, the Bundys' cows "must be returned to them." 5ER:913–915 (Trial 1, Gov't. Exh. 43).

Militia members armed with AK-47 and AR-15-style assault rifles and other munitions arrived from all over the country. 5ER:896 (Message from Payne on April 9: "We have 300 coming as of now. Numbers increasing."). By April 11, hundreds of militia extremists were camped out at the rally site.

By the morning of Friday, April 11, with about 400 head of trespass cattle gathered, BLM stopped impoundment operations for the weekend, intending to begin again the following Monday. 5ER:1001–05. In the late afternoon, however, FBI leadership in Washington, D.C., called BLM leadership at the

impoundment site to inform them about a dire shift in the threat assessment. 5ER:1005–06. The FBI told BLM they "had never seen that number of purported militia groups and organizations coming together in cooperation to one area to support one common cause," and they recommended BLM cease the impoundment. 5ER:1008. The FBI warned that any effort by BLM to gather cattle, or to leave the area, or to transfer the cattle, could be a "flash point" resulting in violence. *Ibid.*

Faced with the news that *any* action they took could lead to a violent encounter, BLM decided to end the operation, evacuate as many civilians from the impoundment site as possible, and enhance security around the site until they could figure out how to safely remove their equipment and the impounded cattle. 5ER:1009–10.

D. On April 12, Bundy Riles up His Armed Militia Supporters Who, at His Direction and on His Order, Travel Several Miles to the Impoundment Site to "Free" Bundy's Cattle by Means of Armed Assault.

On the morning of April 12, Clark County Sheriff Doug Gillespie went to Bunkerville to meet with Cliven Bundy. 5ER:942–44. When he arrived, the Sheriff was directed to the stage at the rally site. *Ibid*. About two hundred Bundy followers were gathered there, many of them carrying firearms. 5ER:943. ("[L]ong rifles, shotguns, hand guns … if you can imagine it, it was

probably there."). When Cliven Bundy took the stage around 9:40 a.m., Sheriff Gillespie told him and the crowd that BLM had called off the impoundment and would be leaving the area. *See* 5ER:950 (Trial 1, Gov't. Exh. 425) (video of event). He said he wanted to sit down with Bundy to talk about how the removal of BLM personnel and assets could be "facilitated in a safe way." *See ibid*. When someone in the crowd yelled something about the cows, the Sheriff added: "the cows are where they have been for the last few days and that is what needs to be discussed," telling Bundy, "you and I need to have a conversation about it." *See ibid.*

When the Sheriff finished, Bundy said he was "not here to negotiate with the Sheriff." *See ibid*. Instead, he delivered an ultimatum, telling the Sheriff to go to the impoundment site, disarm the officers there, and "deliver[]" their weapons to Bundy, on the stage, within an hour. *See ibid*. The Sheriff went to the impoundment site and reported what had happened. 5ER:952.

An hour later, Bundy returned to the stage and told the crowd it was time to "get those cattle." *See* Trial 1, Gov't Exh. 59 (video recording of speech), admitted CR:1786, at 211. The gunmen and other supporters loaded themselves into vehicles and travelled *en masse* five miles to the impoundment site. *See ibid.*; *see also* 5ER:838 ("Bundy gave the Sheriff 1 hour to disarm the BLM . . . he did not reply. We are now going to free the cattle by any means.").

When the followers arrived at the wash, the only thing separating the throng from the impoundment site was a makeshift metal gate underneath the southbound I-15 bridge. The gate was guarded by only a few BLM officers, who immediately called for backup. When Mel Bundy arrived with about 40 followers on horses, the combined force of about 270 moved from under the northbound I-15 bridge toward the officers:

Bundy's militia gunmen took aggressive, prone positions on the bridges and the embankments underneath:

Trial 1 Gov't Exh. 449 (admitted, CR:1828, at 193–94).

Trial 1 Gov't Exh. 440 (admitted, CR:1825, at 149). Seeing this, officers immediately began ordering the crowd to disperse, but the gunmen and followers continued toward the gate. Bundy's followers out-numbered law enforcement officers about 400 to 25. 5ER:879. Officers reported "more guns than they could count." CR:1672, at 175. About 40 followers carried or brandished firearms in the wash, while about 20 others carried or brandished firearms on the northbound bridge and sides of the wash. 5ER:856–57.

To avoid bloodshed, BLM Special Agent-in-Charge Dan Love was forced to give in to Bundy's demands. Approaching the gate, Love told Ammon and Dave Bundy he would release the cattle, but first everyone had to move back so officers could safely disengage. The Bundys refused, saying, "You need to leave … that's the terms … you are on Nevada State property … the time is now." Trial 1 Gov't. Exh. 432 (video recording), admitted CR:1818, at 109.

Seeing no other way to prevent disaster, Love acceded to the threats. He ordered his officers to leave, abandoning to the armed mob the post, impoundment site, and cattle. CR:3176, at 135.

E. Indictment and Trials of the Tier-3 Defendants

On March 2, 2016, a federal grand jury returned a sixteen-count superseding indictment charging Bundy and eighteen codefendants with conspiring to commit an offense against the United States; conspiring to impede

and injure a federal officer; assaulting a federal officer; threatening a federal officer; obstructing justice; interfering with interstate commerce by threat; interstate travel in aid of racketeering; and using and carrying firearms in relation to crimes of violence. CR:27; 6ER:1178–1240.

The district court severed the defendants into three groups for trial. CR:1098. Tier 1 comprised the alleged leaders of the conspiracy: Cliven Bundy, Ammon Bundy, Ryan Bundy, Ryan Payne, and Peter Santilli. *Ibid*. Tier 2 comprised people alleged to be actively involved in the conspiracy, and Tier 3 comprised the alleged "follower-gunmen." *Ibid*. The court ordered trial of Tier 3 first, followed by Tier 1, and then Tier 2. *Ibid*.

In the first Tier-3 trial, the jury convicted Gregory Burleson and Todd Engel on some counts, and hung as to other counts and defendants. CR:1903. On retrial, the jury acquitted two defendants on all charges and two others on some charges, and hung as to other charges. CR:2290. After those verdicts, the court scheduled the Tier-1 trial for October 2017. CR:2331, 2632.[1]

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[1] After nearly two weeks of jury selection, interrupted by numerous defense-motion hearings, the parties presented opening statements on November 14, 2017, CR:2862, and the first witness testified the next day ("Day 7" of trial), CR:2876. After many delays and breaks, the court declared a mistrial on December 20. Although that was "Day 16" of trial, the jury had sat for only eight partial days, most of which included fewer than three hours of

F. Security and Discovery Concerns

Before trial, the government sought to balance orderly disclosure of more than 1.4 terabytes of digital data[2] with protecting witnesses and victims from real and on-going threats. In issuing a protective order, the magistrate judge noted several examples of real-life and on-line vigilantism and harassment suffered in this case by victims, witnesses, and law enforcement officers. *See* 6ER:1154–76. She recounted how Internet exposure by Bundy's on-line followers prompted more than 500 threatening and harassing phone calls to a BLM Chief Ranger, including at least one obscene death threat. 6ER:1160–61 ("We're gonna find you; we're gonna kill you, you f***ing BLM thug, you f***ing f**got.").[3] She included in her order a copy of a photograph (redacted by the government for officer safety) that had been shared on-line more than 1,400 times:

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testimony, and only four of the government's 41 anticipated witnesses had testified.

[2] The government produced more than 200,000 pages of printed material, 2,000 video recordings, and 1,600 audio recordings.

[3] That caller was later convicted of threatening a federal law enforcement officer and transmitting a threatening communication. *United States* v. *Michael*, No. 5:15-cr-86-MSG, at CR:27 (E.D. Pa. Aug. 3, 2015).

6ER:1160.

Most troubling, the magistrate judge described how, in June 2014, Jerad and Amanda Miller, two extremists who had been at Bundy's property in April, murdered two Las Vegas police officers as they ate lunch, then draped a Gadsden flag over one of the officers and shouted this was the start of "a revolution," and later killed a civilian as well. 6ER:1161.[4]

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[4] *See* https://lasvegassun.com/news/2014/jun/09/look/ (last accessed, Jan. 31, 2019). Nor was the district court immune from threats. In December 2017, after the court declared a mistrial, a Bundy supporter posted on social media that the judge and the prosecutor should be "cavity searched – shackled – beaten" and confined until "we the people" decide their "verdicts." CR:3218, at 6. The court later confirmed that "[c]hambers and court staff continued to receive harassing, and at times threatening, communications about this case" for months even *after* the court dismissed the indictment against these

Notwithstanding protective orders, discovery leaked into the public domain. Cognizant of this, prosecutors tried to provide everything relevant and material to the defense, without unnecessarily subjecting to threats or violence individuals with no relevant or material information.

In addition, the government painstakingly reviewed the material in its possession in an effort to provide relevant information without inundating defendants with irrelevant material. This concern was especially acute after Ammon Bundy, in an April 2016 pleading, preemptively warned the government against using "its discovery practices for the purposes of tactical delay." CR 290, at 6; *see also id*. at 7 (suggesting the government might "bypass speedy trial rights by dumping hundreds of thousands of irrelevant pages of so-called discovery in the defendant's lap" (quoting *United States* v. *Koerber*, No. 2:09-cr-302, 2014 WL 4060618, at *5 (D. Utah. Aug. 14, 2014)).

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defendants. 3ER:373. *See also, e.g.*, December 28, 2017, YouTube commenter writing: "On Jan. 9th, 2018, crooked judge Gloria Navarro, will make a decision which will likely either get her IMPEACHED, and INDICTED ... or she will realize her head is also on the chopping block. and Permanently dismiss all charges against the BUNDYS and Militia," *available at* https://www.youtube.com/watch?v=iSvTy3VbAHM (last accessed Jan. 30, 2019); August 26, 2017, YouTube video of Bundy supporter stating, with respect to Chief Judge Navarro, "we need to pick up our guns, go march over there, and drag that b**ch out of the courtroom by her f***ing little ankles, and throw her in a cell," *available at* https://www.youtube.com/watch?v=l0Hx6-r3nmA (last accessed Jan. 30. 2019).

G. The District Court Rejects Affirmative Defenses of "Provocation," "Intimidation," and Self-Defense.

Throughout the litigation, the defendants sought to blame BLM for the assault. Because neither "provocation" nor "intimidation" is a cognizable defense to the charges in the indictment, and because officers never used excessive force (and used no force at all at the impoundment site), the court consistently rejected this strategy.

Months before its dismissal order, the court rejected a self-defense jury instruction for the first Tier-3 trial because "the record belies the defendants' contention that the agents used excessive force." 5ER:844–45. The court explained that officers' alleged "militarization of Bunkerville … warlike garb … [and] weapons" simply did not constitute excessive force, especially where "agents did not even attempt to seize or arrest the protestors." *Ibid*. The court further rejected a "justification" jury instruction, because "any threat to the defendants was not unlawful." 5ER:848.

Consistent with that ruling, the court reiterated during the second Tier-3 trial: "a law enforcement officer is permitted to be in uniform, to take a position during an operation, and to have a weapon." *See* 5ER:813–14. Indeed, the court added, "[t]he pointing of the weapon when people are not cooperating and obeying legitimate orders and directions to leave the area, to move back, and so

forth … could not be excessive force." 5ER:813. Where no officer put hands on any individual or attempted any violence, "the Court can't find that it's subjectively reasonable" to claim excessive force. 5ER:814.

Relying in part on those rulings, the government moved *in limine* to exclude evidence purporting to suggest that BLM officers were "militarized"; "occupied" Bunkerville; or "brutalized" protestors on April 6 and 9. CR:2514, at 16. Cliven Bundy responded that he was entitled to argue "preparation for self-defense to offer an innocent explanation as to why they were armed and prepared to defen[d] themselves from excessive force." CR:2555, at 15.

The court rejected Bundy's contention, explaining that this Court has recognized two forms of self-defense to assaulting an officer, neither of which applied here: (1) "ignorance of the official status of the person assaulted," and (2) "an excessive force defense." 5ER:802 n.2 (citing *United States* v. *Feola*, 420 U.S. 671, 686 (1975); *United States* v. *Span*, 75 F.3d 1383, 1389 (9th Cir. 1996)). The court said evidence relating to self-defense "is irrelevant" absent an offer of proof to establish the elements of that defense. 5ER:802.

H. Discovery Litigation

Despite the government's massive disclosures, defendants repeatedly made demands for discovery and then filed motions to dismiss alleging discovery violations when the government responded. In what became a

familiar cycle, the district court would hold a hearing and conclude the government acted reasonably, but direct us to disclose additional information anyway. Our compliance would generate another round of *Brady* allegations and motions to dismiss, and the cycle repeated.

As the Tier-1 trial got underway, the defendants began filing such motions at a frantic pace, making allegations of misconduct faster than the government could respond or the court could rule.[5] As a result, a hearing on one motion would end up addressing unbriefed accusations from a later motion, and by the time the government demonstrated one defense claim was meritless, the defense had piled on more accusations. Defendants' accusations were also internally inconsistent, complaining about too little, and then too much, discovery—even within the same hearing. *See, e.g.*, 8ER:1351, 1373 (defendants claiming the government never disclosed the location of the Forward Operating Base ("FOB")); *id.* at 1418–20 (government showing the court already-produced discovery detailing FOB location); *id.* at 1421

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[5] *See* CR:2727 (Oct. 18, 2017); CR:2828 (Nov. 6, 2017); CR:2842 (Nov. 8, 2017); CR:2848 (Nov. 13, 2017); CR:2856 (Nov. 14, 2017); CR:2883 (Nov. 20, 2018); CR:2906 (Nov. 27, 2018); CR:2959 (Dec. 6, 2017); CR:2980 (Dec. 11, 2017); CR:3027 (Dec. 19, 2017); CR:3038 (Dec. 19, 2017); *see also* CR:2836 (Nov. 6, 2017, supplement to CR:2828); CR:2892 (Nov. 21, 2017, supplement to CR:2842); CR:2907 (Nov. 27, 2017, supplement to CR:2856).

(defendant complaining this was a "needle in the haystack" of too much discovery).[6]

Between the defendants' deluge of overlapping motions to dismiss, demonstrably untrue claims of withheld information, and contradictory accusations of misconduct, the discovery litigation—which the court allowed to continue even as trial began—became increasingly chaotic and frenzied.

I. Defendants' New Overt Acts Theory

Although defendants had long argued that evidence of government surveillance or "over-militarization" could support self-defense or a "provocation" defense, it was not until November 8, 2017—a week after jury selection began—that they first claimed it could be used to rebut three allegations in the indictment claiming they had falsely stated Bundy's property was surrounded by BLM snipers. *See* 4ER:650–54; 680–82.

In sum, defendants argued that if they *perceived* the camera to be a sniper, or *thought* agents surveilling Bundy's property were snipers, then their statements about being surrounded by snipers would not be subjectively false.

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[6] *See also* CR:2886, at 52 (Ammon Bundy's counsel asserting the Burke 302, disclosed November 7, 2017, was "the first time we've ever heard of a SWAT team"); *but see* 3ER:167–68 (Operation Plan, disclosed May 2017), at 15 ("FBI will stage two SWAT teams … and two hostage negotiators at the Forward Operating Base.").

See 4ER:681 ("[T]he key thing here is that they *felt* that they were surrounded. And I think that the existence of cameras goes to that.") (emphasis added).

After hearing this new theory, the district court reiterated that it had previously found no materiality concerning the surveillance camera, but it credited the new argument as grounds for reassessing that conclusion. The court said "it appears from the Court's [earlier] order that *there was no apparent or readily apparent materiality of the item requested*, and so the Government does not appear to have acted in bad faith by not providing that." 4ER:709–10 (emphasis added). "*But, now*," the court continued, "this Court believes that the Defense has provided sufficient evidence of materiality and a basis for disclosure of information." 4ER:710 (emphasis added).

The court extended that reasoning to requested information about officer positions, firearms, and surveillance. The court said it *now* accepted as reasonable that the "information is relevant to developing a possible defense to" alleged false statements "about the existence of snipers and being isolated and surrounded, feeling isolated and surrounded." 4ER:721–22. As the government complied with the court's new ruling, defendants filed motions to dismiss based on the responsive disclosures. The cycle continued.

On November 13, right after the court denied a motion to dismiss, finding "no *Brady* violation … much less a pattern of any *Brady* violations"

given that "everybody's doing the best they can faced with the information that we have," 8ER:1367, Ammon Bundy filed yet another motion to dismiss based in part on the disclosure of a TOC log. CR:2848.[7] The Court denied that motion as well. 8ER:1393–94. Because defendants had clarified their theory of defense, however, the court ordered the government to review the FBI's police assist file again, "now that we're much more clear about what the defense is," to avoid any "misunderstanding." *Id*. at 1465.

The following morning, the government requested a continuance to gather any responsive emails concerning defendants' new theory. 4ER:610–612. It noted that, as the court recognized, "the theory of the defense is now becoming apparent," and said it wanted to make sure its review was "in accord with the theory of the defense that's been articulated." 4ER:611. The court denied the request, and trial began. 4ER:618.

J. The Final Motions to Dismiss and Mistrial Ruling

After the government's opening statement, Ammon Bundy filed a motion for mistrial based on its request for time to review emails. CR:2856. A few days later, after the government made disclosures in response to the court's new

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[7] The TOC log is discussed in the argument section below.

orders, Payne filed two more motions to dismiss based on those disclosures. CR:2883, 2906. The government filed a consolidated response. CR:2914.

At a November 29 hearing, the court said "it appears more to me that the Government has been diligent, has tried to provide all of the information that it has, [and] has tried to seek out any information out there that is required to be provided either as material under Rule 16 when requested or even when not requested if it is exculpatory or impeachment information." 4ER:510. Specifically with respect to the TOC log, the court said "it doesn't seem like it's something that the prosecution team, meaning the attorneys from the U.S. Attorney's Office, would necessarily have been able to locate by any diligent means." *Ibid*. The court took the motions under submission, however, noting that trial would recess until December 11. 4ER:551.

When court reconvened, although the government had not had an opportunity to respond to additional accusations defendants made in the interim, 3ER:381–85, the court proceeded to recite its "inclinations" on the record. *See* 3ER:386–407. The defense also discussed at length untested accusations in the "Wooten memo." 8ER:1271–78.[8] The government requested

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[8] The so-called "Wooten memo" is an email dated November 27, 2017, from BLM Special Agent Larry Wooten to Associate Deputy Attorney General Andrew Goldsmith, which makes lurid accusations of misconduct against BLM

an evidentiary hearing on that issue, but defendants opposed the request, *see id*. at 1299, and the court did not order a hearing.

On December 14, the government filed a court-authorized sur-reply, explaining why it believed the documents were neither relevant nor material to any issue or cognizable defense and, to the extent any information in the documents was relevant, it was duplicative. *See* CR:3005.

On December 18, Payne filed yet another pleading, styled as a "sur-reply." CR:3027. In addition to disputing the government's sur-reply, Payne mentioned additional documents the government had produced since his last filing, but he did not attach those documents to the filing. *See id*. at 19 n.8.

On December 20, 2017, the court declared a mistrial. *See* 1ER:39–74. After reciting the *Brady* standard, 1ER:43–44, it addressed each item of "untimely evidence," and in nearly every case found a "willful" *Brady* violation.

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and the prosecutors. The prosecution team received the email from Goldsmith on November 29 and disclosed it to the court *in camera* on December 1, requesting a protective order to allow disclosure to the defense. The court entered the protective order on December 8 and we promptly disclosed it. Notwithstanding the protective order, *The Oregonian* published a lengthy news article about the memo on December 14, which noted that "Prosecutors shared [the memo] last week with defense lawyers … but it's not part of the public court record." The court later noted the leak and criticized the "flagrant disobedience of the court's orders" and "open disrespect for the orders of this court." 3ER:374.

The court first found that two documents mentioning the surveillance camera "bolster the defense and [are] useful to rebut the Government's theory"; and it found willful, untimely disclosure, and prejudice to defendants' trial strategies. 1ER:46–47. The court then made nearly identical findings with respect to the other cited documents—including some documents mentioned for the first time in footnotes in Payne's December 18 pleading which, as far as the government is aware, the court had not seen. *See* 1ER:49–58.

The court found "multiple *Brady* violations" that neither recalling witnesses nor a continuance would remedy, and it thus found "manifest necessity" for a mistrial. 1ER:61–62. The court ordered briefing on "whether the mistrial should be with or without prejudice." *See* 1ER:63, 65, 66, 69.

K. The Court's Ruling on Dismissal with Prejudice

On January 8, 2018, the court dismissed the indictment against these four defendants with prejudice. CR:3122; 1ER:16–38 (transcript). After concluding that double jeopardy would not bar retrial, the court articulated the standards for dismissal with prejudice for due process violations and under the court's supervisory authority, 1ER:22–25, and found those standards met.

The court no longer found the government's conduct reasonable in light of the new defense strategy, but instead found it "especially egregious because the government chose not to provide this evidence, even after the defense

specifically requested it." 1ER:25.[9] Despite its earlier findings that the materiality of some of the documents had not been apparent, *see* 4ER:709–10, the court now found "grossly shocking" the prosecution's "representations that it was unaware of the materiality of the *Brady* evidence." 1ER:25.

The court said the government was "on notice" since its October 23, 2017, ruling that "theories of self-defense, provocation, and intimidation might become relevant." *Ibid*. It also said "the government claims it failed to disclose this evidence because the FBI did not provide the documents to the prosecution team," 1ER:26,[10] but noted "the prosecutor has a duty to learn of favorable evidence known to other government agents." *Ibid*. The court concluded that "[b]ased on the prosecution's failure to look for evidence outside of that provided by the FBI and the FBI's failure to provide evidence that is potentially exculpatory to the prosecution for discovery purposes," a "universal sense of justice has been violated." *Ibid*.

The court said the prosecution's argument—that it believed certain documents were neither helpful nor exculpatory, or that the information in

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[9] The court did not say what evidence it was referring to, and cited no specific defense request for evidence that the government did not produce.

[10] The court did not say what evidence it was referring to, but the TOC log, discussed below, was the only document we said the FBI had not provided.

them was already known to the defense—was an effort to "minimize[] the extent of prosecutorial misconduct," 1ER:30; and that the prosecution team's "reliance on the FBI to provide the required information amounted to an intentional abdication of its responsibility," 1ER:31.

Explicitly acknowledging that the "government has attempted to locate all outstanding discovery," the court nevertheless repeated its earlier, unexplained finding that the government made "misrepresentations … regarding the existence of the cameras, the snipers, the materiality of prior threat assessments and its … diligence in fully complying with its constitutional obligations." 1ER:33. The court therefore found "there has been flagrant prosecutorial misconduct in this case even if the documents themselves were not intentionally withheld from the defense." 1ER:34. The court concluded that "retrying the case would only advantage the government," and it dismissed the case with prejudice both on due process grounds and as an exercise of its supervisory authority. 1ER:36.

The government timely moved for reconsideration. CR:3175. Defendants responded, CR:3192, 3194, 3195; and the government replied. CR:3199. On July 3, 2018, the court denied the motion. 1ER:4–14.

V.

ARGUMENT

Dismissal with Prejudice Based on the Timing of the Government's Production of Certain Documents Was Unwarranted Because Any Government Missteps Were Inadvertent; the Record Does Not Support the Court's Findings of Substantial Prejudice and of Flagrant or Outrageous Government Misconduct; and Lesser Sanctions Were Sufficient to Remedy Any Harm.

A. Standards of Review

"Dismissal of an indictment on due process grounds is reviewed de novo; dismissal based on the court's supervisory powers is reviewed for abuse of discretion." *United States* v. *Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991).

"[A]bsent flagrant and prejudicial prosecutorial misconduct, this [C]ourt will find that the district court's dismissal of an indictment is an abuse of its discretion." *United States* v. *Jacobs*, 855 F.2d 652, 655 (9th Cir. 1988). Where "the sanction imposed [is] disproportionately harsh in relation to the alleged misconduct, the district court abuse[s] its discretion in dismissing the indictment and [this Court] must reverse." *Id*. at 656.

B. Analytical Framework

Dismissal. Where both flagrancy and substantial prejudice are shown, a district court may dismiss an indictment on one of two bases: outrageous government conduct that amounts to a due process violation, or as an exercise of the court's supervisory powers. *United States* v. *Chapman*, 524 F.3d 1073,

1084 (9th Cir. 2008). In either case, dismissal is permitted "only in extreme cases." *United States* v. *Christensen*, 624 F. App'x 466, 476 (9th Cir. 2015) (unpublished), *cert. denied*, 137 S. Ct. 628 (2017) (citing *United States* v. *Nobari*, 574 F.3d 1065, 1081 (9th Cir. 2009)); *United States* v. *Doe*, 125 F.3d 1249, 1257 (9th Cir. 1997) ("This is a high standard … and even in some of the most egregious situations it has not been met" (internal citation omitted)); *see also United States* v. *Struckman*, 611 F.3d 560, 577 (9th Cir. 2010) ("'Because it is a drastic step, dismissing an indictment is a disfavored remedy.'") (quoting *United States* v. *Rogers*, 751 F.2d 1074, 1076–77 (9th Cir. 1985)).

"To violate due process, governmental conduct must be 'so grossly shocking and so outrageous as to violate the universal sense of justice.'" *Barrera-Moreno*, 951 F.2d at 1092 (quoting *United States* v. *Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991)); *see also Nobari*, 574 F.3d at 1081. "Dismissal under the court's supervisory powers for prosecutorial misconduct requires (1) flagrant misbehavior and (2) substantial prejudice." *United States* v. *Kearns*, 5 F.3d 1251, 1253 (9th Cir. 1993). Such dismissal is appropriate only when "no lesser remedial action is available." *Barrera-Moreno*, 951 F.2d at 1092.

Dismissal with prejudice. Because "'[d]ismissing an indictment with prejudice encroaches on the prosecutor's charging authority,' this sanction may be permitted only 'in cases of flagrant prosecutorial misconduct.'" *Chapman*, 524

F.3d at 1085 (quoting *United States* v. *Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)).

"[A]ccidental or merely negligent governmental conduct is insufficient to establish flagrant misbehavior." *Ibid.* (citing *Kearns*, 5 F.3d at 1255); *see United States* v. *Toilolo*, 666 F. App'x 618, 620 (9th Cir. 2016) (unpublished) ("'extremely high' due process dismissal standard" not met even where the prosecution was "sloppy, inexcusably tardy, and almost grossly negligent").

Brady and *Giglio* violations "are just like other constitutional violations," and although a "district court may dismiss the indictment when the prosecution's actions rise … to the level of flagrant prosecutorial misconduct," the "appropriate remedy will usually be a new trial." *Chapman*, 524 F.3d at 1086 (citing *Giglio* v. *United States*, 405 U.S. 150, 153–154 (1972)); *see United States* v. *Kohring*, 637 F.3d 895, 912–913 (9th Cir. 2011) (same).

"'[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" *Struckman*, 611 F.3d at 577 (quoting *United States* v. *Morrison*, 449 U.S. 361, 364 (1981)). In this Court, the "extreme remedy" of dismissal is justified only when "the government's conduct … caused substantial prejudice to the defendant and [was] flagrant in its disregard for the limits of appropriate professional conduct." *United States* v. *Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993).

C. The Government's Inadvertent, or at Worst Negligent, Failure to Disclose Duplicative Documents Does Not Justify Dismissal with Prejudice.

This case involves more than 1.4 terabytes of produced discovery. Yet the district court dismissed the indictment with prejudice based on the government's November and December 2017 disclosures of just a handful of documents, several of which were not submitted to the court for its review before it ruled. The documents underlying the district court's dismissal with prejudice generally fall in three groups: those the government failed to disclose through simple inadvertence; those we failed to disclose because we did not know about, or were unable to find, them; and those we did not produce based on the prosecution team's considered judgment that they were not relevant to any issues or cognizable defenses in the case.

These groups overlap, but generally the first group includes (1) certain maps produced in December 2017, 2ER:75–83, (2) the Felix supplemental 302, 2ER:84–85, (3) the Delmolino supplemental 302, 2ER:86–87, and (4) the Racker 302, 2ER:88; the second group includes (5) a BLM Internal Affairs report about the Mojave Desert Tortoise habitat, and (6) a logistics record kept by the never-activated FBI SWAT team (*i.e.*, "TOC log"), 2ER:89–97; and the third group includes (7) two documents that mention the surveillance camera, *i.e.*, the Burke 302, 2ER:98, and the FBI Operations Order, 2ER:99–113; and

(8) threat assessments prepared for a 2012 impoundment which never took place, *see* 2ER:114–155.[11]

The prosecution team spent hundreds of hours reviewing documents with the goal of producing everything that was relevant or material, while at the same time avoiding a disorganized "document dump"; meeting speedy trial obligations; and protecting witnesses, victims, and others from the very real possibility of threats and violence. Prosecutors kept a meticulous discovery index, documenting production of thousands of pieces of discovery. *See* ER9:1476–1558. Despite these diligent efforts, the results were not without

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[11] With the exception of the desert tortoise report, all of these documents are in Excerpts of Record Volume II, in the order in which they are discussed in this brief, and comprise 81 pages (*i.e.*, less than one-tenth of one percent of the 200,000 document pages the government produced in discovery). The first half of Excerpts of Record Volume III includes documents provided much earlier containing the same information, and other documents relevant to those issues, also in the order in which they are discussed in this brief. Beginning on page 365, the rest of the excerpts of record includes transcripts and orders in traditional, reverse-chronological order.

The desert tortoise report is about five pages long, but includes about 350 pages of attachments comprising memoranda of individual interviews, handwritten interview notes, a 159-page 2007 "Biological Opinion" report, and other supporting material. As far as the government can tell, the defense did not provide the report or any of the supporting material to the district court for its review, and thus it is not part of the record. At this Court's request, the government will file a motion to expand the record to include these documents and to transmit them to the Court.

error. But any errors were inadvertent, or at worst negligent, and thus even assuming they constituted *Brady* violations in one or more instances, they do not support the extreme sanction of dismissal with prejudice of the indictment.

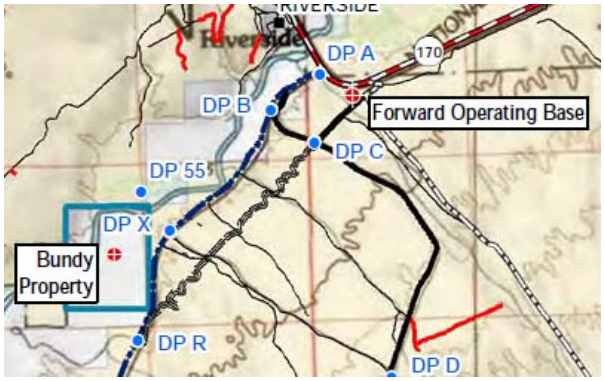
Moreover, the court's findings of "flagrant" and "outrageous" misconduct and "substantial" prejudice rested on its assumption that the government withheld certain *information*—such as the existence of a surveillance camera, FBI officers at the Forward Operating Base, officers in "sniper" roles, and assessments of the threat posed by Bundy and his supporters. But the government timely disclosed significant information about all of those matters, belying any suggestion of willful suppression and undermining any finding of substantial prejudice.

1. The government's failure to disclose duplicative maps and three FBI 302s through simple inadvertence was neither flagrant misconduct nor substantially prejudicial.

a. The additional maps contained no new information, and the failure to disclose them earlier was neither flagrant nor substantially prejudicial.

In June 2016, the government produced several maps reflecting the pre-set coordinates by which officers identified their locations during the impoundment, *i.e.*, the drop point ("DP") locations. 3ER:171–173. These maps clearly identified all of the drop point locations near Bundy's property, including DP-X, which was identified in other discovery as a Lookout Post/Observation Post ("LP/OP"):

3ER:173. On December 15, 2017, in response to defense requests, the government produced additional maps which, in all material respects, mirror the earlier-produced maps. 2ER:75–83:



2ER:75.

In his December 18, 2017, pleading, without attaching copies of the new maps or noting the previously produced maps, Payne asserted the new maps were "relevant to Payne's theory of defense." CR:3027, at 16 n.3; *see also id*. at 19 n.8 (asserting the maps "show[] the exact location for the LPOPs during the impound operations"). In its oral mistrial ruling two days later, the district court—without giving the government an opportunity to respond—found the maps "do appear to be *Brady* information." 1ER:53. Without explanation or

elaboration, the court also found the maps "do appear to have been withheld willfully and they do prejudice the Defense." *Ibid*.

A side-by-side comparison of the 2016-produced maps and the 2017-produced maps shows the district court's finding of prejudice is erroneous.[12] The only claim of relevance Payne made with respect to the maps was their identification of the drop point locations, and the government had produced maps showing those *exact* drop point locations more than a year earlier. Neither the court nor the defendants identified anything on the later-disclosed maps materially different from earlier-disclosed maps. *Compare* 2ER:75–83 *with* 3ER:171–173. And even a quick comparison establishes no material difference between the earlier- and later-disclosed maps, undermining any claim that delayed disclosure of the later maps was "willful" suppression constituting "flagrant misconduct," or that it caused "substantial prejudice."

b. Any relevant information in the Felix 302 was timely disclosed, as the defense's pleading made plain.

Long before trial, the government produced significant discovery about the events surrounding Dave Bundy's arrest on April 6, 2014. In June 2016, we produced emails from BLM Rangers Russell and Brunk describing how they

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[12] Nothing in the record suggests the district court was provided the maps for its review before making this finding.

were in overwatch position, how Russell "had Agent Brunk's AR15 in case the situation escalated," and how Brunk at one point "took a prone position with [his] shotgun beside [him]." 3ER:174–175. In March 2017, we produced a dash cam video of the arrest, showing Brunk and Russell in overwatch. *See* 3ER:177 (Def. Exh. 5008-F). At the first Tier-3 trial, a government witness identified the officers "up on the ridge" in the dash cam video as Brunk and Russell, 3ER:179; and Brunk himself testified that he was "above the immediate scene when David Bundy was arrested," 3ER:193; *see also* 3ER:194.

In December 2017, in response to Payne's mid-trial request for discovery about specific agents, the government found a 2015 supplemental 302, which it had inadvertently not produced earlier, summarizing an interview with National Park Service Officer Ernesto Felix.[13] The supplemental 302 stated that "Felix observed a BLM Agent on high ground in a 'tactical over watch position' southwest of [where] Dave's arrest occurred." 2ER:84.

In a footnote in his December 18 pleading, Payne noted that production of an "FBI 302 regarding BLM SA Felix observing a BLM officer in a 'tactical

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[13] The government disclosed more than 400 FBI 302s and BLM memoranda of activity ("MOAs"), *see*, *e.g.*, 9ER:1478–81, 1484–87, 1493–1504, 1506–10, including reports for all officers who testified at trial and many who did not. Among the documents disclosed were Felix's 2014 302, 3ER:195–196, and his MOA. *See* 9ER:1516.

over watch position' on April 6, 2014 (*referring to BLM Rangers Brunk or Russell during Dave Bundy arrest*)." *See* CR:3027, at 19 n.8 (emphasis added). Without attaching the 302, Payne claimed it "bolster[ed] the notion that snipers were in the area and that the Bundy household was surrounded." *Ibid*.

Two days later—without giving the government an opportunity to respond and apparently without having been provided a copy of it—the court found the 302 "favorable" and "potentially exculpatory"; found "willful" suppression based on FBI authorship;[14] and found "prejudice" due to "Defense represent[ations] that they would have proposed different questions for the jury voir dire, exercised their challenges differently, and provided a stronger opening statement." 1ER:50.[15] These findings and conclusions are wrong.

The Felix supplemental 302 provided *no* new information about BLM agents in overwatch during Dave Bundy's arrest. Indeed, the fact that Payne knew that Felix was "referring to BLM Rangers Brunk or Russell," CR:3027, at 19 n.8, proves the defendants already had that information. Felix's statement that he saw one of these officers could hardly "bolster" the undisputed fact of

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[14] As explained in the next subsection, this authorship-willfulness conclusion is erroneous as a matter of law.

[15] As explained in Section F, below, the defense made no such representations with respect to this document.

Brunk and Russell's overwatch position during the arrest more than the officers' own email messages and the video showing them there, or Brunk's own trial testimony. Any possible relevance of the supplemental 302 was entirely duplicative, *see Rhoades* v. *Henry*, 638 F.3d 1027, 1038–39 (9th Cir. 2011) (no disclosure violation where one of three reports was produced and the reports not turned over added no details unavailable from the other sources), and thus the court's finding of substantial prejudice was erroneous.

c. The district court's ruling equating FBI authorship with willful suppression, and thus flagrant misconduct, is erroneous.

Although the government disclosed BLM Agent Delmolino's 2014 302 and his 2014 MOA, *see* 9ER:1516, 3ER:197–198, it inadvertently failed to disclose his 2015 supplemental 302. Prosecutors discovered the oversight after a November 3 defense request for information about surveillance, and produced the supplemental 302 on November 7, a week before opening statements. *See* 9ER:1536.[16] When the court declared a mistrial, it said this 302 was "potentially exculpatory" because it "provides information regarding BLM

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[16] In the supplemental 302, Delmolino recounted being posted in the desert near Bundy's property the nights of April 5-6 and 6-7, 2014, and noted that he wore "BLM tactical clothing" and "carried a BLM AR-15 rifle." 2ER:86. The Racker 302 similarly recounts nighttime LP/OP positions near Bundy's residence. 2ER:88.

individuals wearing tactical gear, not plain clothes, [and] carrying AR-15s," and that it "potentially rebuts" allegations of defendants' false misrepresentations about snipers isolating the Bundys. 1ER:49–50. The court found "willful" suppression "because the FBI created" the 302. 1ER:50. The court made the same finding of "willfulness" with respect to the Racker 302.[17] *Ibid*.

The court's finding that "because the FBI created these documents" the suppression was a "willful failure to disclose"—a finding the court repeated as to several other documents—is incorrect as a matter of law. Drawing this authorship-willfulness nexus effectively imposes "strict liability" for discovery errors, virtually eliminating the possibility of inadvertent or negligent nondisclosure. Because the FBI was part of the prosecution team, the court found its failure to disclose FBI-generated documents *ipso facto* constituted

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[17] In discovery produced in March 2017, the government identified the six officers assigned to nightwatch overlooking the Bundy residence. *See* 3ER:199 (names redacted on the public docket per court's order, *see* 3ER:373). But months later, after their trial began, Ryan Payne claimed the defense did not have that information, CR:2906, at 7 n.5, and requested discovery about those officers. In response, the government produced the 2014 Racker 302, which states that "Racker conducted LP/OP duties in the area of the Bundy Ranch" for a time. 2ER:88. In his December 18, 2017, pleading, Payne noted that disclosure. *See* CR:3027, at 19 n.8. Payne made no argument, but simply claimed the 302 "bolster[ed] the notion that snipers were in the area and that the Bundy household was surrounded." *Ibid*.

flagrant misconduct. The court cited no authority supporting such a rule, and the government is aware of none.

The court further found that this "willful" nondisclosure constituted "flagrant" government misconduct sufficient to justify the extraordinary sanction of dismissal with prejudice. Such an expansive interpretation of "flagrant" would require dismissal with prejudice for virtually every *Brady* violation. This Court clearly rejects this view. *See*, *e.g.*, *Kearns*, 5 F.3d at 1255 (even "negligent" or "grossly negligent" conduct did not rise to the level of "flagrant misconduct"); *Kohring*, 637 F.3d at 912–913 (appropriate remedy for *Brady/Giglio* violation is usually new trial).

In any event, to the extent information about BLM officers' tactical gear and weapons near Bundy's property could plausibly be used to defendants' benefit, the government had already timely provided ample discovery of that information. *See*, *e.g.*, 3ER:167–68 (detailed description of night shift noting that "[t]eams will be strategically placed at elevated positions around the Bundy residence each evening," with "360-degree visual surveillance of the Bundy residence," and with "agency issued rifles"); 3ER:205 (2014 BLM Threat Assessment produced in May 2017 describing "24/7 coverage" on Bundy's house); *see also* 3ER:213–214 (302 showing plan enacted); 3ER:215–217 (dispatch records chronicling same); *see also* CR:2159, at 5 (Ryan Payne noting

in a July 2017 pleading that discovery produced in May 2017 "*makes clear* that the Bundy residence was being surveilled 24/7 by means of a covert LP/OP Team.") (emphasis added). Any error in providing duplicative documents about these matters cannot amount to "flagrant misconduct."

Moreover, defendants knew about the law enforcement presence around Bundy's residence—including from the supplemental Delmolino 302 produced before trial—and used that information at trial. Accordingly, the court's finding of substantial prejudice as to this category of information was also erroneous.

2. The government's failure to produce one document it was unable to find and one document it had no reason to know about does not warrant the extreme sanction of dismissal.

a. The government produced the desert tortoise report as soon as we found it, and our failure to discover it earlier was not unreasonable under the circumstances.

In November 2017, the government produced two documents that referred to an "OIG report" "direct[ing] the BLM to enforce" the court orders against Bundy, *see* 2ER:131 (2012 BLM OLES Threat Assessment), and finding that "BLM failed to manage the land by not enforcing" the orders, *see* CR:2883, Exh. K (JTTF meeting minutes).

In September 2017, prosecutors had asked BLM Special Agent Kent Kleman to find this "OIG report." Kleman contacted several people within BLM and the Department of the Interior's Office of Inspector General

("OIG"), but could not find any such report. *See* 3ER:220–222 (Kleman's notes and email summarizing search).

On November 20 and 21, 2017, defendants complained that the government had not produced the so-called "OIG report." CR:2902, at 137–138; CR:2904, at 89. The government responded it had been unable to find, but would continue to look for, the seemingly irrelevant report. CR:2904, at 94, 100–101. We also noted that OIG's database of reports was equally available to the defense, so the defendants could "search for it as well." *Id.* at 94.

On December 2, 2017, prosecutors found several pages of a report titled "Mojave Desert Tortoise Complaint," located that whole report, and learned that *that* report—from BLM Internal Affairs, *not* the OIG—was the so-called "OIG report."[18] The government immediately produced the report, along with a letter from the chief of BLM's Office of Professional Responsibility explaining why it had been so difficult to locate. 3ER:218–19.

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[18] An anonymous October 2009 call to the Department of the Interior's OIG complained that illegal grazing was harming Mojave Desert Tortoise habitat in violation of the Endangered Species Act. OIG referred the matter to BLM Internal Affairs for investigation. 3ER:218. The investigator interviewed range, wildlife, and law enforcement specialists who were "extremely disappointed" in BLM's efforts to stop illegal grazers, including Cliven Bundy. The question whether tortoise habitat was actually being harmed was explicitly outside the scope of the investigation, but the report concluded that BLM's inaction made it vulnerable to Endangered Species Act lawsuits.

Payne asserted the defense could have used the report to cross-examine the government's first witness, former BLM District Manager Mary Jo Rugwell. 8ER:1257. Their theory was that BLM overstated the threat posed by the Bundys to justify its earlier failure to protect the desert tortoise habitat. CR:2904, at 103–04. The government responded that such an inference, even if plausible, would be pertinent only if defendants could then argue BLM's "militarized" presence provoked the assault. CR:3005, at 34. But the court had rejected that argument, so evidence supporting it was irrelevant. *Ibid*.

In granting the mistrial, the court made its same non-specific *Brady* findings with respect to the tortoise report, 1ER:57, and concluded it "would have been useful to potentially impeach Ms. Rugwell who testified that there had been a detrimental impact on the desert tortoise habitat." *Ibid*.[19] The court also found the information was "willfully suppressed." *Id*. at 57–58. This finding, and the underlying legal conclusion, are wrong.

First, whether Bundy's illegal grazing harmed tortoise habitat is irrelevant to any fact of consequence in this case, and thus the government's failure to

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[19] The court also said that the report documents that a BLM special agent "requested for the FBI to place a surveillance camera." 1ER:19. It does not, and the court *sua sponte* corrected that clearly erroneous finding in its oral ruling on January 8. 1ER:28–29.

locate and provide the report earlier could not have caused substantial prejudice to the defense on that point. Second, it does not appear the defendants provided the report for the court's review, so it is unclear how the court reached its finding that the report was material.[20] And third, the court gave no explanation for its finding of "willful" suppression except to say the report "was available to the government," and to suggest the government was at fault for misidentifying it as an OIG report. 1ER:19. The record does not support the court's findings.

b. The government produced the TOC log as soon as we learned about it, and our failure to discover the log earlier did not constitute "flagrant" or "outrageous" misconduct.

From April 5 through April 8, the FBI provided back-up support for the impoundment from a Tactical Operation Center ("TOC," *i.e.*, a trailer used as a mobile operations center) at the Forward Operating Base, about 1.5 miles from Bundy's property. 3ER:169. During its limited involvement, the TOC maintained an administrative log—a "timeline of activities related to SWAT operations for accountability purposes." 3ER:225; *see* 2ER:89–97 (TOC log).

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[20] Indeed, the court's statement that the report "allegedly … suggests" there was no documented injury to the tortoises implies it relied on the defendants' description of the report to support its "flagrant" misconduct and "substantial prejudice" findings. Because dismissal with prejudice is an extreme sanction the court may impose only when it finds flagrant misconduct causing substantial prejudice, *see Lopez*, 4 F.3d at 1464, a district court clearly errs—and abuses its discretion—by delegating that inquiry to the defense.

Most entries recount SWAT member and asset locations. *See*, *e.g.*, 2ER:91, 95 ("ET's Justin and Thomas heading to town to get diesel"; "Helo relocates from Mesquite airport to ICP"). A few entries note observations. *See*, *e.g.*, *id*. at 93 ("Individuals in cars on 170 are outside vehicles with cameras and phones"). Because FBI never activated its SWAT teams, this logistics record was never added to the investigative file or to FBI's "police assist" file, but instead remained on a thumb drive in the TOC trailer. 3ER:225.

At a November 8 hearing, after the government confirmed that a short-lived surveillance camera did not record, the court asked whether observations from the camera might have been documented in notes or reports. 4ER:643. The prosecutor confirmed the "investigative file" and the FBI's "police assist" file contained no such records. 4ER:643–44.

The next day, as FBI Special Agent Sharon Gavin continued to research the matter, another special agent told her that camera observations might have been noted on the TOC log. 3ER:228. At Gavin's request, that agent found the log (still on a thumb drive in the TOC trailer parked at the FBI field office). 3ER:225. Gavin reviewed the log and saw four entries from April 5 and 6 related to the surveillance camera. *Ibid*. Those entries included the following:

(1) "5:35 p.m. -- Small silver SUV arriving at subject's house";

(2) "5:40 p.m. -- Red/Burgundy SUV tinted windows arrived at subject's house"; and

(3) "6:07 p.m. -- Bundy located at the Gold Butte Camera on the phone."

2ER:91 (April 5). The April 6 entry noted, "11:22 a.m. -- Quad observed crossing Bundy property in front of camera, shortly after, camera feed was lost." 2ER:92.

In reviewing the TOC log, Gavin also noted two entries from April 5 about "snipers inserted (training)." *See* 2ER:90, 91. Gavin investigated, and the SWAT team leader explained that the entry referenced two sniper-designated SWAT operators who surveyed the area by helicopter to determine any viable sniper locations should the need arise, but "[a]t no time were any snipers deployed by the FBI during the Gold Butte Operation." 3ER:228.[21] The government disclosed the log the following day, in compliance with the court's order; the disclosure immediately prompted another defense motion to dismiss.

In its mistrial order, the court found the TOC log "favorable" and "potentially exculpatory" because "it provides information about the family being surveilled by a camera, and specifically lists three log entries using the word 'snipers,' including snipers being inserted and that they were on standby."

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[21] As explained below, and as timely-produced discovery made clear, officers from the National Park Service and the Las Vegas Metropolitan Police Department SWAT team did assume "sniper" roles at various times.

1ER:51. The court believed earlier discovery and production of the TOC log would have potentially helped the defense rebut the three overt act allegations that the Bundys falsely claimed isolation by snipers. *Ibid*.

The court again found "willful" suppression based on FBI authorship and nondisclosure. 1ER:52. And it stated the TOC log's revelation—that two sniper-trained agents surveyed the area in case the use of FBI snipers ever became necessary—further demonstrated willfulness because, the court said, "the Government[] strong[ly] insiste[d] in prior trials that no snipers existed." *Ibid*. The court found prejudice, stating that "[t]he suppression did prevent the Defense from using the information about the snipers in opening statement and rebutting elements of the indictment." 1ER:53. The court's findings of flagrant misconduct and substantial prejudice based on the TOC log fail.

First, to the extent the court found misconduct or substantial prejudice based on the defense's assertion that the government did not disclose the existence of government snipers, those findings are clearly erroneous because the government disclosed several reports explicitly discussing law enforcement officers in "sniper" roles. *See* CR:3081, at 33 (*citing* 9ER:1517 (GB.018868: 302 recounting that National Park Service Officer J.S. responded to the impoundment site as "part of the designated sniper team")); *ibid*. (*citing* 9ER:1517 (GB.018876–9: MOA recounting how National Park Service Officer

J.L. worked with a "precision rifle" and a "spotter" on the night of April 11, and while working the next day identified a "sniper team" that was part of LVMPD SWAT); *see also id.* at 33–34 (noting other discovery describing law enforcement officers in "tactical," "marksmen," and "sniper" positions).

Second, the court's statement regarding "the Government's strong insistence in prior trials that no snipers existed," is incorrect. The dispute in the prior trials involved Eric Parker's insistence that BLM Rangers Russell and Brunk (in visible overwatch during Dave Bundy's arrest on April 6) were "snipers," and that officers in visible overwatch on the mesa northeast of the impound site were "snipers." They were not. *See*, *e.g.*, 5ER:984 (BLM Ranger Logan Briscoe testifying that the "LP/OP" on the mesa was for overwatch only, and not a place officers could "use force from").[22] The government refuted claims that officers in visible overwatch were "snipers," but never "insisted that no snipers existed," a fact amply disclosed in discovery.

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[22] The government generally called the officers who took precision rifle positions "marksmen," while the defendants generally sought to characterize any law enforcement officer on a hill with a rifle as a "sniper." The government frequently took issue with the defendants' incorrect use of that charged term, both because it was inaccurate and because defendants used it improperly to imply law enforcement misconduct or provocation. Law enforcement operations sometimes use snipers, and such actions neither constitute excessive force nor justify armed assaults on federal officers.

Indeed, a Park Service ranger testified in the first trial that he deployed his "designated marksman team"; described the role of that team; and agreed with defense counsel when asked "So a designated marksman team is similar to, like, a sniper team; correct? A: Yes." 3ER:243. The record belies the court's erroneous finding that the government insisted "no snipers existed." And without that finding, the court's finding of "flagrant" misconduct fails.

The government's disclosures disprove defendants' claims that we withheld the fact that officers were present in sniper positions, information they had *and used* at trial. *See* 3ER:250, 251 (Cliven Bundy's opening statement referencing snipers). Whatever helpfulness the TOC log's duplicative sniper references provided, defendants cannot show substantial prejudice given their advance knowledge, and use, of that information at trial.[23]

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[23] In its order dismissing the indictment with prejudice, the district court also said the government's "representations about whether individuals were technically 'snipers' or not 'snipers' was disingenuous"; that "arguments about whether [snipers] were actually 'deployed' or merely 'training' was a deliberate attempt to mislead and to obscure the truth"; and that "[n]umerous other instances are noted by the defense in the brief and the Court does not disagree with these representations." 1ER:33–34. The court gave no explanation for any of these statements, and the government can divine none. There is nothing disingenuous in noting that a law enforcement officer in clearly visible overwatch is not a "sniper," especially where defendants sought to transform this into a loaded term in connection with their non-cognizable provocation theory. Presumably the court's second statement refers to the TOC log's notation "Snipers inserted (Training)," *see* 2ER:90, but the court took no

3. The government's failure to appreciate the possible relevance of certain documents was not unreasonable in light of the district court's earlier rulings, and does not constitute "flagrant" misconduct.

a. The district court explicitly found that the materiality of information about the surveillance camera was not apparent until November 8, 2017; and in any event, the court's finding of "substantial prejudice" fails because the defendants had, and used, this information at trial.

Of the hundreds of 302s the FBI prepared in this case, one documented Special Agent Burke's investigation of a lost live-camera feed near Bundy's property. 2ER:98. Burke recounted that "[t]he camera (which is not configured to record) had been placed into position"; the live feed was lost shortly after Ryan Bundy drove by it on an ATV; and after Burke found ATV tracks near the damaged, inoperable camera, he took it back to the Forward Operating Base. *Ibid*. On November 3, 2017, Cliven Bundy requested "video recordings" from the camera, and on November 7, the government produced the Burke 302 to confirm that the camera was not configured to record. 5ER:730–31.

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evidence on that issue, so we are at a loss as to how it determined "the truth" or concluded the government was attempting to obscure that "truth." And as for the court's last statement, the government does not know what "instances … noted by the defense" the court is referring to, and we were given no opportunity to respond to any accusations in that defense brief, as the court ordered simultaneous briefs and did not invite argument before ruling.

Relatedly, in compliance with the court's November 13, 2017, order that the government disclose FBI reports created as part of the impoundment, on November 17 we disclosed an FBI Law Enforcement Operations Order that mentions the camera. That 15-page, fill-in-the-blank document, akin to a company work order, describes the "mission" of the operation; provides basic information about Cliven and Ryan Bundy; and identifies the allocated FBI personnel and equipment. *See* 2ER:99–113. *Id.* Relevant to the court's dismissal ruling, Page 7 of the Order notes the surveillance camera:

SITUATION/MISSION CONTINUED

INTELLIGENCE - Additional pertinent information can be added as an attachment

- ☐ Site Survey Results
- ☐ Danger Areas
- ☐ Aggressive Animals
- ☑ Surveillance Systems Internet camera with view of Bundy residence

2ER:105.

In declaring a mistrial, the court pointed to the Burke 302 and page 7 of the Order, concluding that information about the camera's existence, its proximity, and its surveillance of the Bundy home "potentially rebuts" allegations that the Bundys falsely claimed they were surrounded by BLM snipers. 1ER:46–47. It again found "willful" nondisclosure based on FBI authorship. 1ER:47. And it found the timing of the disclosure prejudicial based on defense representations "that they would have proposed different jury

questions for voir dire; and they would have exercised their peremptory challenges differently; and provided a stronger opening statement." 1ER:48.

The court's findings are wrong. First, in noting use of a non-recording situational-awareness surveillance camera, neither document contains any apparent actual or potential *Brady* information. The fact that officers used a surveillance camera for better awareness in a remote area is unremarkable, and is neither exculpatory nor impeaching.

To prop up their claim, defendants argued that the mere existence of a surveillance camera could "rebut" the notion that they falsely claimed the BLM "employed snipers against Bundy family members," *see* 6ER:1196; that "Bundy Ranch was surrounded by snipers," *see* 6ER:1197; and that "they have [Bundy's] house surrounded," *see* 6ER:1198. In dismissing the indictment, the court apparently accepted defendants' argument that a lone surveillance camera could be construed as BLM snipers surrounding the Bundy property. But even if that argument were plausible, the court had already specifically found that the government's failure to anticipate it did not constitute bad faith.

After the government disclosed the Burke 302, the court reconfirmed its prior ruling that "there was no apparent or readily apparent materiality" of information surrounding the surveillance camera until the defendants unveiled their new argument that the camera could have made them feel surrounded or

been mistaken for a sniper. *See* 4ER:709–10 (finding no bad faith). The court's explicit ruling that the materiality was not apparent until after the government produced the Burke 302 negates any finding of flagrant misconduct.

Moreover, defendants had long known about the camera. In a 2014 undercover interview, Ryan Bundy discussed the camera's placement on public lands in sight of Bundy's property, and admitted knocking it over; the government produced that video to all defendants in May 2016, more than a year before trial. *See* 9ER:1556 (1D68). At a November 8, 2017, hearing on yet another motion to dismiss, a defense witness testified that "everyone" at Bundy's property saw the conspicuous camera and talked about it. *See* 3ER:267 ("And somebody had pointed out, Hey, there's a camera up there, and we all looked at it like, Oh, okay.").[24] And in his opening statement, Ryan Bundy described "see[ing] surveillance cameras on the hills." 3ER:283. Thus, to the extent the court based its dismissal decision on a factual finding that the government committed outrageous misconduct by hiding the existence of the camera, it clearly erred. *See Cunningham* v. *Wong*, 704 F.3d 1143, 1154 (9th Cir. 2013) (no suppression where defendant is aware of the essential facts).

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[24] The witness testified he was not sure whether the "Bundy boys" or Cliven knew about it, but said the camera was clearly visible and became "kind of like a joke." 3ER:278–79.

The court also clearly erred to the extent it found substantial prejudice based on the defendants' alleged inability to use this information in opening statements. *See* 1ER:48. The defendants not only *could* use the information—the Burke 302 was disclosed a week before opening statements—they *did*, with Cliven and Ryan Bundy both discussing the camera during their openings (and with Ryan Bundy talking explicitly about knowing the camera was there at the time). *See* 2ER:250 ("The FBI had a camera [to] . . . surveil exactly what the Bundys were doing"); *id*. at 260 (similar); *id*. at 283 (similar). Because the defense long knew about the camera, and made use of it at trial, the court clearly erred in finding "substantial prejudice" sufficient to warrant the dismissal of the indictment.[25]

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[25] Although the court initially said it was inclined to believe the government late disclosed the FBI's *participation* in the impoundment, 3ER:392, it did not make that finding when it declared the mistrial and dismissed the indictment with prejudice, and in any event such a finding would be clearly erroneous. *See, e.g.*, CR:270, at 4 (government's April 2016 pleading noting FBI's involvement); 3ER:169–170 (Operation plan, disclosed in May 2017, detailing FBI's planned role); ER9 (hundreds of FBI 302s produced in discovery). Indeed, in pleadings filed months before trial, Ammon Bundy and Ryan Payne both wrote about the FBI's presence during the impoundment operations, and Cliven Bundy discussed it in his opening. *See* CR:833, at 3 (noting "FBI investigators were present" from April 6 to April 9); CR:2066, at 3 (similar); CR:2329, at 5–6 (similar); 3ER:250–251 (Cliven Bundy's opening statement noting FBI's involvement).

The court's conclusions were also flawed to the extent they relied on its "findings" that the government "falsely represented that the camera view of the Bundy home was incidental and not intentional," and that prosecutors called the defendants' request for information about the camera a "fantastic fishing expedition." 1ER:47. The government made no such representations.

At a hearing two weeks before opening statements, the court asked National Park Ranger Mary Hinson about the surveillance camera's capabilities, and she responded its purpose was to "monitor the Bundy house, the roadway, the—where the cattle gathering was going to be coming and going, where we had law enforcement officers out in the area." 5ER:778.[26] And although the government characterized as "fantastical" Ryan Bundy's suggestion that the surveillance camera was a "mysterious devi[c]e[]" capable of "painting" the Bundy home for artillery or aerial "target acquisition," *see*

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[26] We could find only one stray remark—in the government's cross-examination of Hinson—that could possibly be interpreted as implying the view of Bundy's house on the camera was incidental. *See* 5ER:795 ("Q. –[S]o the camera that was placed on public land in that area, was it meant to give you a view of that general area? A. Yes. Q. And it happened to be that that included the Bundy residence? A. Yes."). But neither the government's generalized question nor Hinson's response undermined her unequivocal testimony that monitoring Bundy's house was one explicit purpose for the camera, and that single remark cannot support the court's finding that we "falsely represent[ed]" such a fact.

CR:2299, at 3, it did not deny the existence of the camera, but rather responded that, "even if, as [Ryan Bundy] claims fantastically, [surveillance cameras] were capable of allowing for" these things, this was immaterial to the charges in the indictment. CR:2340, at 3. The government never denied the existence of the camera (which defendants knew about), and never suggested it did not monitor the Bundy house. Findings to the contrary are clearly erroneous.

b. The government's November 2017 production of threat assessments prepared for an unexecuted 2012 impoundment operation does not constitute "flagrant" or "outrageous" misconduct.

In March 2014, in anticipation of the impoundment, BLM prepared a report that assessed the overall threat level as "moderate," and assessed the threat posed by various individuals and groups as low, low/moderate, or moderate (*e.g.*, Cliven Bundy was rated "Moderate"). 3ER:200–12. The government produced the 13-page threat assessment to the defense in May 2017, many months before trial.

Also in March 2014, the FBI's Behavioral Analysis Unit ("BAU") followed up on its "threat assessment conducted on Cliven Bundy in March 2012" to say it found no "need to change its previous assessment." 3ER:293. BAU concurred in BLM's March 2014 threat assessment, and it complimented BLM "on a very thorough and detailed assessment." 3ER:294. The government produced the 2014 FBI-BAU report to defendants in June 2016, more than a

year before trial. And in January 2017, the government produced the grand jury testimony of BLM Special Agent-in-Charge Dan Love, who testified that, while BLM saw a "high likelihood" of interference from Cliven Bundy and his family, they believed at the outset that the likelihood of a violent encounter was "low to nonexistent." 3ER:345.

At trial, Ms. Rugwell testified on cross-examination that, before the 2014 impoundment operation, she had reviewed an older FBI assessment prepared in anticipation for a 2012 impoundment which never took place, and she said the 2012 assessment indicated Cliven Bundy was not a threat. 4ER:566.[27] In response, the defense requested any threat assessments related to the aborted 2012 impoundment. 4ER:580–588. The government promptly produced the 2012 FBI-BAU assessment, 2ER:114–123;[28] and a 2012 Southern Nevada Counterterrorism Unit threat assessment, which anticipated little risk of violence in 2012 from Bundy himself, 2ER:124–129. The same day, the

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[27] Rugwell's recollection was incorrect. In fact, the FBI's assessment of Cliven Bundy in 2012 found a "low to moderate risk of significant or imminent … predatory acts of targeted violence" at this time [in 2012], but a greater likelihood "that Bundy might engage in more affective, spontaneous, and opportunistic acts of violence in the future." 2ER:120.

[28] That report explicitly did not assess the threat from Bundy's family members, their associates, or other groups that might pose a risk of violence during the impoundment. 2ER:115–116.

government also produced a "GAR risk assessment" for the 2014 impoundment. 2ER:146–155.[29] Shortly thereafter, it produced the BLM's 2012 Threat Assessment. 2ER:131–145. Those disclosures prompted additional defense motions to dismiss. CR:2883, 2959, 2906.

In its oral ruling declaring a mistrial, the district court recited the same non-specific *Brady* findings as to these assessments. 1ER:54. It noted "favorable information about the Bundys' desire for a nonviolent resolution" in one of the reports, a statement in another report "that the BLM antagonizes the Bundy family," and a statement in a third report that the Bundys "[w]ill probably get in your face, but not get into a shootout." 1ER:54, 55. The court also added that BLM's "failure" to implement a "strategic communication plan" "bolsters the Defense theory that even if the information received by Mr. Payne from the Bundy media campaign was incorrect, that no alternative information was available for him to discover the truth directly from the Government." 1ER:55.

The court found "willful" "late" disclosure because the FBI had most of the documents. *Ibid*. It found prejudice based on defense representations that they could have used the information to cross examine Ms. Rugwell, to propose

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[29] This document, prepared to help law enforcement foresee and mitigate risks, is not a "threat assessment," but the district court grouped it with the threat assessments, so we include it in that part of the discussion below.

different voir dire questions, and to exercise peremptory challenges differently. 1ER:56. And it further found, without explanation, that the information in the threat assessments "provides a stronger opening statement that they were prevented from giving, using information about snipers in their opening arguments and rebutting elements of the indictment." *Ibid.* The record does not support the court's finding of flagrant misconduct or substantial prejudice.

First, we cannot understand how a passing reference to BLM's plan to provide the media and the public with information about the operation—regardless whether that plan was put into effect—could "bolster" the defense. The court cited no authority for the proposition that the government's failure to correct a defendant's misunderstanding of a situation absolves that defendant of guilt for his unlawful acts. This finding is clearly erroneous.

Second, the court found the 2012 BLM threat assessment "favorable" because it recounts a 2012 interview with an animal control officer who said he thought the Bundys "will probably get in your face, but not get into a shoot-out." 1ER:55 (quoting 2ER:140). In doing so, the court appears to have adopted a broad definition of "favorable" as including virtually any positive statement. But for *Brady* purposes, information is favorable only if it is exculpatory or impeaching. *See United States* v. *Chung*, 659 F.3d 815, 831 (9th Cir. 2011). The fact that one person, two years earlier, speculated that the

Bundys would "probably … not get into a shoot-out" neither negates any element of the charged offenses nor undermines the relevant testimony of any government witnesses.

In any event, the court's finding of flagrant misconduct and substantial prejudice presumes the government withheld BLM's assessment that Cliven Bundy did not pose a significant threat for physical violence. But the government disclosed that information, many months earlier, specifically acknowledging that, prior to the 2014 impoundment, BLM expected him to interfere but thought the likelihood of a violent encounter was low to nonexistent. 3ER:345; *see Rhoades*, 638 F.3d at 1038–39 (no disclosure violation where one of three reports was turned over and the other reports added no new details). Because defendants had this information in time to use it, the court's finding of substantial prejudice is clearly erroneous.

D. The District Court's Other Basis for Finding Flagrant or Outrageous Misconduct Also Fails because the Court Had Repeatedly Ruled That BLM's Purported "Militarization" Did Not Justify Defendants' Alleged Crimes, and Self-Defense Was Not Cognizable in This Case.

The court found "grossly shocking" and "flagrant" misconduct because it concluded that, after October 23, 2017, "the government was well aware that theories of self-defense, provocation, and intimidation might become relevant." 1ER:25. This was error for two reasons. First, this finding squarely contradicts

the court's earlier rulings that these defense theories were not available absent a showing of actual use of excessive force by the officers. And second, even if the court's earlier findings were incorrect and those defenses were cognizable, the government's reasonable, good-faith reliance on the court's rulings precludes any finding of willful or "flagrant" misconduct.

1. "Provocation" and "intimidation" are not cognizable defenses.

Federal law does not recognize defenses of "provocation" or "intimidation" to the charges in the indictment. *See United States* v. *Taylor*, 680 F.2d 378, 380 (5th Cir. 1982) (federal officer's words, no matter how provoking, provide no legal basis for assaulting officer); *United States* v. *Sovie*, 122 F.3d 122, 126 (2d Cir. 1997) ("provocation" does not excuse illegal threats); *cf. United States* v. *Wilson*, 698 F.3d 969, 972 (7th Cir. 2012) (rejecting self-defense resting on an impermissible basis, like racial provocation).

The lawful presence of law enforcement officers doing their jobs cannot justify assaulting or interfering with them, even if the defendant believes the officers are "over-militarized." *Cf. United States* v. *Branch*, 91 F.3d 699, 714 (5th Cir. 1996) ("We do not need citizen avengers who are authorized to respond to unlawful police conduct by gunning down the offending officers.") (internal quotation marks omitted).

2. Self-defense was not available here.

Federal law recognizes an affirmative defense of self-defense to assaulting a federal officer, but in only two limited circumstances: (1) where a defendant forcefully resists an attack, reasonably believing the attacker is not an officer; or (2) where a defendant reasonably resists excessive force by an officer. *United States* v. *Span*, 970 F.2d 573, 576–577 (9th Cir. 1992).

Here, defendants never disputed the identity of the officers they confronted and threatened in the wash, and it is beyond dispute that the officers used *no force*, let alone excessive force.[30] Although a suspect has a right to resist excessive force by an officer, merely displaying service weapons does not trigger a right to resist. *See Hinojosa* v. *City of Terrell, Tex.,* 834 F.2d 1223, 1231 (5th Cir. 1988) (displaying weapon conditionally threatening force not excessive force); *cf.* C*alifornia* v. *Hodari D.,* 499 U.S. 621, 625–626 (1991) (show of authority without application of force not a seizure); *Cty. of Los Angeles, Calif.* v. *Mendez*,

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[30] Although officers used force in response to the April 9 convoy attack, defendants have never linked their self-defense theory to Count 4 (which charges that assault) or disputed that Ammon Bundy attacked first. "[T]he attacker cannot make out a claim of self-defense." *United States* v. *Acosta-Sierra*, 690 F.3d 1111, 1126 (9th Cir. 2012); *accord United States* v. *Wagner*, 834 F.2d 1474, 1486 (9th Cir. 1987); *United States* v. *Urena*, 659 F.3d 903, 907 (9th Cir. 2011). Even assuming a cognizable self-defense theory for the April 9 incident, the court did not dismiss the case on that basis.

137 S. Ct. 1539 (2017) (rejecting this Court's "provocation rule," which had permitted an excessive force claim where an officer "provoked" the confrontation by illegally entering and reasonably firing in self-defense).

3. The government's reasonable reliance on the district court's repeated, consistent rulings on this issue cannot amount to "flagrant" or "outrageous" misconduct.

In its order finding "shocking" misconduct, the district court said the government was "on notice after the Court's [October 23, 2017, order], that a self-defense theory may become relevant if the defense was able to provide an offer of proof, outside the presence of the jury." 1ER:25. But that order explained that self-defense is only available where (1) the defendant did not know the official status of the person assaulted, or (2) the defendant used force in response to the actual use of excessive force by an officer, *see* 5ER:802 n.2, and none of the documents on which the court based its findings of "flagrant" misconduct or "substantial" prejudice touched on either of those elements. Indeed, the district court had repeatedly explained that officers' alleged "militarization of Bunkerville … warlike garb … [and] weapons" did not constitute excessive force. 5ER:845; *see also* 5ER:813–14.

Even assuming these are valid defenses, to the extent the government erred in failing to appreciate that information about law enforcement officers' tactical gear, weapons, and official duties were relevant to a possible

"provocation" or self-defense claim, that error was based on its reasonable, good-faith reliance on the court's repeated rulings that such information was not relevant to those claims. While the court may have changed its mind on this issue, that change does not transform the government's actions into "flagrant" or "outrageous" misconduct.

E. Inadvertent, or Even Negligent, *Brady* Violations Do Not Warrant the Extreme Remedy of Dismissal of an Indictment.

The government's diligent efforts to promptly produce everything relevant or material to the defense were not without error. We overlooked three 302s from non-testifying officers. We did not believe information about the surveillance camera was material (and the district court initially agreed with us). *See* CR:2886, at 91–92. We did not know about the TOC log. And we searched at length for an "OIG report" only to eventually discover what we were looking for was not an OIG report at all, but rather a 2009 Internal Affairs report about a citizen complaint involving desert tortoise habitat. To the extent any of the government's shortcomings constituted *Brady* violations, they were clearly inadvertent, and certainly not willful.

In its ruling dismissing the indictment with prejudice, however, the district court found government errors it had only weeks earlier deemed diligent and reasonable now to be "flagrant," "reckless," "intentional," "grossly

shocking," and in violation of a "universal sense of justice." *See* 1ER:25–26, 31–36. The court's conclusions fail as a matter of law; and the record and the facts do not support the district court's condemnation of the prosecutors in this case.

Apparently referring to the TOC log, the district court summarily concluded: "Based on the prosecution's failure to look for evidence outside of that provided by the FBI and the FBI's failure to provide evidence that is potentially exculpatory to the prosecution for discovery purposes, the Court finds that a universal sense of justice has been violated." 1ER:26.

As a matter of law, that explanation is inadequate to warrant dismissal. *See*, *e.g.*, *United States* v. *Toilolo*, 666 F. App'x 618, 620 (9th Cir. 2016) ("Dismissing an indictment on due process grounds historically has been employed in a 'slim category of cases' involving police brutality or 'physical or psychological coercion against the defendant.'" (quoting *United States* v. *Simpson*, 813 F.2d 1462, 1465–66 (9th Cir. 1987)); *Kearns*, 5 F.3d at 1253 (dismissal under the court's supervisory powers requires "flagrant misbehavior" and "substantial prejudice"). Under the district court's reasoning, every lapse by a prosecution team in seeking discoverable information from investigative agencies, and every failure of an investigative agency to provide potentially

exculpatory evidence to the prosecution for discovery purposes, would warrant dismissal of an indictment. That is not the rule.

Kearns is on point. There, seeing no written confidential-informant agreement in its files, officers informed the prosecutor that no such written agreement existed. The prosecutors in turn affirmatively misrepresented to defense counsel that the testifying confidential informant had only an oral agreement with law enforcement. 5 F.3d at 1253. On the last day of Catherine Kearns's trial, the government discovered and turned over the informant's written agreement with law enforcement. *Ibid.* Upon learning the prosecutor had affirmatively misrepresented that the agreement was not in writing, the district court dismissed the indictment. *Ibid.*

On the government's appeal, this Court reversed. The Court found that the police department's "erroneous response appear[ed] to have been due to incompetence and other non-invidious factors rather than to intentional deception," and noted that the prosecutors turned over the copy of the written agreement as soon as they received it. *Id.* at 1254. This Court thus concluded that "dismissal of the indictment against Catherine on the ground of prosecutorial misconduct cannot stand." *Ibid.*

Here, with respect to the TOC log, the government's case is even stronger. First, prosecutors *did not* simply rely on representations from the FBI,

but rather ensured that the investigative file and the FBI police assist file had been searched for any documentation regarding observations from the surveillance camera. Second, even when the log was discovered, the surveillance camera and sniper entries were entirely innocuous. Neither the government nor the FBI had reason to foresee, for example, any exculpatory, impeaching, or other relevant value in the fact that a small silver SUV arrived at the Bundy property at 5:35 p.m. on April 5, 2014; or that sniper-trained SWAT officers surveyed the area by helicopter to determine viable locations should the need arise.

Because cooperation agreements with testifying witnesses are so clearly *Giglio* material, the Court in *Kearns* might well have concluded that prosecutors have an obligation to probe further and not simply take the police at their word that no written agreement exists. But even there, this Court did not find the government's failure to do so amounted to a due process violation. If failing to discover what is obviously *Giglio* material does not in and of itself violate due process, it cannot be that failing to "follow up" on a 302 (which explicitly confirmed the surveillance camera was not set up to record) and search beyond the investigative and support files for documents memorializing observations from that camera violates due process or a "universal sense of justice."

Kearns forecloses the district court's dismissal with respect to the government's failure to disclose the TOC log, the court's only stated basis for its finding that a "universal sense of justice has been violated." The court's other conclusion—that the government's failure to appreciate the materiality of the surveillance camera was "grossly shocking"—fails as well, in light of its own explicit finding that "there was no apparent or readily apparent materiality" of the surveillance camera until the defendants raised their novel "we-might-have-mistaken-the-camera-for-a-sniper" argument on November 8. Under this Court's precedent, the district court's conclusion that the government's errors met the exceedingly high standard to warrant dismissal of the indictment, on either due process or supervisory authority grounds, must be reversed. *See United States* v. *Doe*, 125 F.3d 1249, 1257 (9th Cir. 1997) (noting standard for dismissal is reserved for "extreme cases" and has not been met "even in some of the most egregious situations").

F. The Court's Cursory Findings of Substantial Prejudice Are Erroneous, and in Any Event Are Insufficient to Warrant Dismissal.

In its order granting a mistrial, the district court recited a nearly identical "finding" of prejudice with respect to each item on which it based its ruling:

> As to the prejudice, the Court does find that this suppression has undermined the confidence in the outcome of the case; that the Defense represents that they would have proposed different jury questions for voir dire; and they would have exercised their

> peremptory challenges differently; and provided a stronger opening statement.

1ER:48 (prejudice regarding surveillance camera information); *see also* 1ER:50 (same, Delmolino 302, Felix 302, Racker 302); 1ER:52 (similar, TOC log); 1ER:56 (similar, threat assessments); 1ER:58 (stating, with respect to the desert tortoise report, "The suppression has now undermined the confidence in the outcome of the trial for the same reasons previously stated"); 1ER:53 (stating, with respect to the maps, "They do appear to have been withheld willfully and they do prejudice the Defense").

With respect to the Felix 302, the Racker 302, the maps, and the desert tortoise report, it does not appear that the district court was provided those documents before it ruled. Moreover, contrary to the court's conclusory statements, with respect to the 302s and maps, defendants made no representation that they would have "proposed different jury questions for voir dire"; "exercised their peremptory challenges differently"; or "provided a stronger opening statement" if they had received them earlier.[31] The district

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[31] As noted above, Ryan Payne mentioned those three items in a footnote in a December 18, 2017, pleading, made no particular argument with respect to any of them, and did not attach them to his pleading so the court could review them. Nevertheless, two days later and with no further briefing or discussion, the district court explicitly found they amounted to willful, prejudicial *Brady* violations.

court's findings and conclusions with respect to those items are clearly erroneous, and given that the court articulated nearly identical findings and conclusions with respect to the other items, no basis exists on which this Court could conclude with any confidence that the district court undertook the required prejudice analysis with respect to any of the items on which it based its dismissal. And for the reasons stated above with respect to specific items cited by the district court, the court's prejudice analysis fails.

In any event, the government has not found a case from any court finding prejudice warranting dismissal of an indictment on the ground that defendants would have approached jury selection or opening statements differently if they had received discovery materials earlier. If that alone justified the extraordinary sanction of dismissal with prejudice, virtually every *Brady* violation discovered during or after trial would warrant that sanction. This is not the rule. *See Chapman*, 524 F.3d at 1086 (noting that the "appropriate remedy" for *Brady* or *Giglio* violations "will usually be a new trial").

G. Dismissal with Prejudice Was Unwarranted Because Several Lesser Sanctions Were Available.

Both the Supreme Court and this Court have "repeatedly pointed out that dismissal of an indictment, particularly with prejudice, is a drastic measure." *United States* v. *Isgro*, 974 F.2d 1091, 1098 (9th Cir. 1992). "Accordingly, the

Supreme Court has cautioned that when faced with prosecutorial misconduct, a court should 'tailor[ ] relief appropriate in the circumstances.'" *Ibid*. (quoting *United States* v. *Morrison*, 449 U.S. 361, 365 (1981)); *see Morrison*, 449 U.S. at 365 ("Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances…"). Thus, even if this Court concludes that the timing of the government's disclosures constituted *Brady* violations deserving of sanction, dismissal of the indictment was inappropriate because several lesser sanctions would have been sufficient to remedy any violations.[32]

1. Striking three allegations from the indictment

If the timing of the government's disclosures hampered the defense's ability to rebut three specific allegations in the indictment, striking those

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[32] After the court declared a mistrial, it ordered briefing solely on the question whether "the mistrial should be with or without prejudice." 1ER:63, 65, 66, 69. The parties briefed that question, which centers primarily on whether the government committed flagrant misconduct causing substantial prejudice to the defendants. *See Kearns*, 5 F.3d at 1253. Neither the government nor any defendant briefed the question of what lesser sanctions might be appropriate if the court disagreed with their position on flagrant misconduct and substantial prejudice, and the court did not hear argument at the January 8, 2018, hearing. The government argued in its motion to reconsider that the court erred by failing to consider lesser sanctions. CR:3175. In denying reconsideration, the court stated that it *had* considered lesser sanctions—although it did not identify the ones it considered—but found them insufficient. 1ER:13.

allegations and precluding the government from introducing evidence to support them would fully remedy any prejudice. If the government is precluded from arguing in its case in chief that the defendants' representations about being "surrounded by snipers" were false, the defendants would not be prejudiced from any "late" disclosure of material with which they could dispute the falsity of those representations.

2. Dismissing Count 1 or Count 16, or both

If that remedy is deemed insufficient, dismissal of Count 1, the conspiracy count that requires proof of an overt act, would more than cure any prejudice the defendants claimed to suffer to their ability to rebut the allegations that they falsely stated that government snipers were surrounding Bundy's property. Count 16 concerns defendants' use of the Internet in aid of extortion, so depending on the nature of prejudice the Court finds, dismissal of that count might also be appropriate. Indeed, the district court might have considered dismissing both Count 1 and Count 16.

Dismissal of one or more counts would be an extreme sanction, to be sure, but less drastic than dismissing the entire indictment with prejudice, and more appropriate given the nature of the *Brady* violations the court found. Even under the district court's interpretation of the government's *Brady* obligations, and its stated findings regarding the potential value of the purported "late-

disclosed" material, dismissal of the counts to which that material related would have entirely remedied the violations.

3. Dismissal of the indictment without prejudice

Finally, of course, the district court could have dismissed the indictment without prejudice. *See*, *e.g.*, *United States* v. *Taylor*, 487 U.S. 326, 342 (1988) ("Dismissal without prejudice is not a toothless sanction" because, among other things, "it forces the Government to obtain a new indictment if it decides to re-prosecute").

Accepting the defendants' argument, the district court found that retrying the case would "only advantage the government," because the prosecution could strengthen its witnesses' testimony "based on the knowledge gained from the information provided by the defense and revealed thus far," "perfect its opening statements based on the revealed defense strategy," and "conduct more strategic voir dire." 1ER:35. In reaching those conclusions, however, the court was considering only two options: dismissal with prejudice or retrying the case on the same charges. If the court tailored the relief to "neutralize the taint" of the misconduct it found, by precluding the government from making any arguments based on the overt acts alleging false statements or dismissing the counts to which those allegations related, those perceived advantages to the government would disappear.

VI.

CONCLUSION

For the reasons stated above, the United States respectfully requests that this Court reverse the district court's dismissal of the indictment and remand for further proceedings.

Dated this 6th day of February, 2019.

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VII.

STATEMENT OF RELATED CASES

Todd Engel and Gregory Burleson, codefendants who were convicted in the first trial in this matter, have filed notices of appeal. Engel's appeal has been docketed as 18-10293, and his opening brief is due in this Court on April 5, 2019. Burleson's appeal has been docketed as 17-10319; proceedings on his appeal have been stayed pending the district court's ruling on his motion for a new trial.

s/ Elizabeth O. White
ELIZABETH O. WHITE
Appellate Chief and
Assistant United States Attorney

Dated: February 6, 2019

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(c) AND CIRCUIT RULE 32-1

I hereby certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points, and contains 16,634 words.

Contemporaneous with its submission of this brief, the government has filed a motion for leave to file an oversized brief.

s/ Elizabeth O. White
ELIZABETH O. WHITE
Appellate Chief and
Assistant United States Attorney

Dated: February 6, 2019

CERTIFICATE OF SERVICE

I certify that on February 6, 2019, I electronically filed the foregoing Government's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

In addition, I served a copy of the government's opening brief on Appellee Ryan Bundy via U.S. Mail at the following address:

Ryan Bundy
PO Box 7557
Bunkerville, NV 89007

s/ Elizabeth O. White
ELIZABETH O. WHITE
Appellate Chief and
Assistant United States Attorney